

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ROBERT VOLPE AND CAROLE VOLPE	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
and Unincorporated Business Tax under Articles	:	
22 and 23 of the Tax Law for the Years 1973	:	
through 1977.	:	

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Petitioners, Robert Volpe and Carole Volpe, 98-05 67th Avenue, Apartment #7D, Forest Hills, New York 11374, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1973 through 1977 (File No. 803371).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 23, 1987 at 1:15 P.M., with additional evidence to be submitted by September 23, 1987. Petitioners appeared by Nathan Altman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioners' claims for credit or refund of penalties imposed upon assessments of personal income and unincorporated business taxes for the years at issue.

FINDINGS OF FACT

1. For the years at issue, petitioners Robert Volpe and Carole Volpe, failed to file Federal income tax returns and New York State personal income and unincorporated business tax returns. In 1978, based upon a review of petitioners' records, the Internal Revenue Service calculated their tax liability for the years at issue herein and also for the year 1978. The said tax liability,

plus interest and penalties, was paid in full by petitioners.

2. Based upon the aforesaid determinations by the Internal Revenue Service, the Audit Division assessed personal income tax and unincorporated business tax against petitioners for the years at issue. Warrants were issued by the State Tax Commission. Petitioners subsequently paid, in full, the taxes assessed plus interest and penalties and, in April 1984, satisfactions of judgment were filed by the Department of Taxation and Finance.

3. The penalties at issue herein were imposed by the Audit Division pursuant to the provisions of Tax Law § 685(a)(1), (2) and Tax Law § 722(a) (which incorporates the provisions of Tax Law § 685[a][1], [2]) for failure to timely file a tax return and for failure to pay the amounts shown as tax on any return required to be filed on or before the prescribed date.

4. On September 10, 1985, the Department of Taxation and Finance received from petitioners claims for credit or refund of personal income tax and/or unincorporated business tax as follows:

<u>Year</u>	<u>Amount of Refund or Credit Claimed</u>
1973	\$ 3,303.33
1974, 1975	6,940.35
1976	4,544.10
1977	<u>228.47</u>
	\$15,016.25 Total <sup>1</sup>

5. On February 24, 1986, the Audit Division issued a Notice of Disallowance to petitioners which advised:

"An addition of penalty to tax is mandatory. Under the present regulations of the New York State Tax Law, you have not provided reasonable cause of the abatement of penalty."

6. Petitioner Robert Volpe came under the care of Dr. Ellen H. Schor, Clinical Psychologist, in August 1978 and under the care of Dr. Adam Lewenberg, M.D., in January 1979 for depression, anxiety and an alcoholism problem.

#### SUMMARY OF PETITIONERS' POSITION

7. After payment of their Federal tax liability for the years 1973 through 1976 and 1978, petitioners made application to the Internal Revenue Service for abatement of various penalties and/or additions to tax which had been assessed and which had been paid by petitioners. In

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<sup>1</sup>It is unclear from the record whether the amounts claimed by petitioners to have been paid as penalties were, in fact, penalties or whether such amounts also included interest.

August 1985, petitioners received from the Internal Revenue Service various checks which they contend represented abatement of such Federal penalties and/or additions to tax. Petitioners contend that such penalties and/or additions to tax were fully refunded by the Internal Revenue Service by reason of their having established reasonable cause for failure to file and failure to pay and that, as a result of such determination that petitioners had established reasonable cause for Federal purposes, New York State must follow suit and refund all penalties imposed and paid by petitioners for the years at issue. Petitioners presented no evidence to indicate which Federal penalties and/or additions to tax had originally been imposed, whether such amounts had been reduced or fully abated and the reasons therefor.

8. Petitioners contend that reasonable cause existed for failure to timely file personal income and unincorporated business tax returns and for failure to pay the amounts shown as tax on returns required to be filed by virtue of the fact that petitioner Robert Volpe was under medical care for depression, anxiety and an alcoholism problem.

9. It is alleged that petitioner Carole Volpe had no earnings for the years at issue and was in no position to file tax returns for these years. Petitioners offered no evidence relating to said petitioner's income or the reasons for her inability to file returns for the years at issue.

#### CONCLUSIONS OF LAW

A. That Tax Law § 685(a)(1), (2) impose penalties for failure to timely file an income tax return and for failure to timely pay the amounts of income tax shown on any return required to be filed, respectively. Tax Law § 722(a) incorporates the aforesaid provisions and imposes such penalties for failure to timely file unincorporated business tax returns and pay amounts of tax shown on the returns. Pursuant to these provisions of the Tax Law, these penalties will be imposed unless it is shown that such failure to file or pay is due to reasonable cause and not due to willful neglect.

B. That petitioners have failed to sustain their burden of proof, imposed pursuant to the provisions of Tax Law §§ 689(e) and 722(a), to show that reasonable cause existed for their

failure to timely file personal income and unincorporated business tax returns and to timely pay over amounts of tax shown on returns required to be filed. Although petitioner Robert Volpe was under medical care for depression, anxiety and an alcoholism problem, the evidence presented indicated that such medical treatment did not commence until August 1978, a time which was subsequent to the period at issue. No evidence was presented which would indicate that petitioner's condition existed from 1973 through 1977. Moreover, petitioners have failed to prove that Robert Volpe's psychological and/or medical conditions, even if the same existed throughout the period at issue, were of such magnitude as to provide reasonable cause for failure to file returns and pay tax. It should also be noted that, based upon the amounts of tax assessed for each of the years at issue, it is clear that Robert Volpe was, in spite of any psychological and/or medical problems which may have existed, able to earn a substantial income. As indicated in Finding of Fact "9", supra, petitioner Carole Volpe has not sustained her burden of proving that she was unable to timely file returns and pay taxes during this period.

C. That 20 NYCRR 153.4 provides as follows:

"The Tax Commission is not required to accept as correct any change (as set forth in this Part) in a taxpayer's Federal taxable income, Federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution, Federal credit for employment-related expenses or the disallowance (in whole or in part) of a claim for credit or refund of Federal income tax or the amount an employer is required to deduct and withhold from wages for Federal income tax withholding purposes. Instead, the Tax Commission may conduct an independent audit or investigation in regard thereto."

D. That although the Internal Revenue Service chose to refund to petitioners all or a portion of the penalties assessed and paid in conjunction with their Federal income tax assessment for certain of the years at issue herein, the Department of Taxation and Finance is permitted to make an independent determination as to whether or not penalties should be imposed for State tax purposes. Said determination having been made to impose such penalties, petitioners must sustain the burden of proving that such determination was improper by showing

that reasonable cause existed for failure to timely file returns and pay taxes due. As indicated in Conclusion of Law "B", petitioners have failed to sustain such burden.

E. That the petition of Robert Volpe and Carole Volpe for a refund of penalties imposed upon assessments of personal income and unincorporated business taxes is hereby denied.

DATED: Albany, New York  
December 10, 1987

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ADMINISTRATIVE LAW JUDGE